LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1125~~ 225

C. E. NIEHOFF & CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES R. SPROWL,
134 South La Salle Street,
Chicago 3, Illinois,

WHITNEY CAMPBELL,
E. MARVIN BUEHLER,
134 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	7
Conclusion	10
Appendix A	i
Appendix B	xii

CITATIONS

Cases.

Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, certiorari denied 350 U. S. 991	7
Federal Trade Commission v. C. E. Niehoff & Co., 935, October Term 1956	1

Statute.

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13(a) and 13(b)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

C. E. NIEHOFF & CO.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, C. E. Niehoff & Co., prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause on March 28, 1957.

This Court has heretofore on June 3, 1957, granted certiorari in this matter in No. 935, this term, on the petition of the Federal Trade Commission, which petition raised only the question of the power of judicial review conferred by Section 11 of the Clayton Act upon the United States Court of Appeals. A certified transcript of the record below, together with nine printed copies thereof, has already been filed in No. 935, and, in accordance with Rule 21-5 of this Court, no additional record is being filed herewith.

OPINIONS BELOW.

The Hearing Examiner's Initial Decision appears in the printed record at pages R. 980 to 1011. The Opinion of the Commission appears at R. 1013 to 1028. The Opinion of the Court of Appeals (Appendix A, *infra*, pp. i to xi) is reported at 241 F. 2d 37.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 28, 1957 (Appendix B, *infra*, pp. xii to xiii). The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner, which sells a line of automotive replacement parts consisting of 3,200 different items ranging in price from two cents to $4.50 per item, and having an average price of 66 cents per item, has established a defense under Section 2(b) of the Clayton Act to a charge of price discrimination by showing that its volume discount plan, offered uniformly to all of its purchasers, was established in good faith to meet the equally low prices of the substantially similar pricing methods of its ten principal competitors.

2. Whether petitioner has made out a defense of cost justification under Section 2(a) of the Clayton Act by establishing that its average salesman, catalog and advertising expense per account fully justifies all price differentials offered by petitioner at every volume level of purchase.

STATUTE INVOLVED.

Sections 2(a) and 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, that nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *
>
> (b) * * * That nothing * * * shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT.

The complaint in this proceeding charges that petitioner, C. E. Niehoff & Co., violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by having a pricing structure which discriminates in the prices at which petitioner's products are offered to different purchasers.

Petitioner manufactures and sells to automotive jobbers on a nation-wide basis a line of automotive ignition and hydraulic brake parts. Petitioner is unable to sell any of its products to the automobile manufacturers, such as General Motors, Chrysler and Ford, or to the franchised automobile dealers of such manufacturers (because of the competition of the so-called "original" parts manufacturers, Delco-Remy, Auto-Lite and Ford), and accordingly all of petitioner's products are sold and distributed as replacement parts only. The automotive jobbers to whom petitioner sells its products in turn distribute these products to independent garages, filling stations and the like, for sale as replacement parts.

Petitioner sells its line through its own salesmen who travel twelve separate territories, each such salesman calling on the jobbers in his territory in rotation.

FACTS RELEVANT TO PETITIONER'S MEETING IN GOOD FAITH THE EQUALLY LOW PRICES OF ITS COMPETITORS.

Petitioner's line of automotive replacement parts consists of 3,200 different items ranging in unit price from two cents to $4.50, with an average unit price per item of 66 cents.

In the sale and distribution of its products on a nation-wide basis, petitioner has nineteen principal competitors,

each of which offers a volume purchase discount plan to jobber purchasers.

Because of the large number of items in petitioner's line, the low average price per item, and the small amount of each separate sale, it is not feasible for petitioner to have a base sale price and only to grant annual volume discounts from such prices at the point of sale in order to meet the lower discount prices of its many competitors.

The only method available to petitioner whereby it can meet these lower discount prices of its competitors is through the adoption of a similar discount plan which is uniformly available to all jobber purchasers on a nation-wide basis.

Accordingly, in good faith petitioner adopted an annual volume discount plan similar to the plans offered by its competitors, but not identical to any one of them. This plan is available uniformly to all of petitioner's purchasers, and petitioner's salesmen are not permitted to sell to any jobber purchaser except at petitioner's base prices and applicable annual volume purchase discounts.

Petitioner has one base price schedule at which it sells to all of its jobbers, and from this schedule petitioner grants its annual volume purchase discounts, which discounts are available uniformly to all of its jobbers.[1]

1. The annual volume purchase discounts granted by petitioner uniformly to its jobbers are as follows:

Annual Volume of Purchases	Discount Allowance
$ 0 —$ 1,200	None
$ 1,200—$ 2,400	5 %
$ 2,400—$ 3,600	7 %
$ 3,600—$ 6,000	10 %
$ 6,000—$ 8,400	14.5%
$ 8,400—$12,000	15.4%
$12,000 & over	16.3%

Generally speaking, petitioner's base prices are slightly higher than its competitors' base prices,[2] and the annual volume discounts which petitioner grants from such base prices are not as large as those granted by its competitors.

FACTS RELEVANT TO COST JUSTIFICATION.

Petitioner's salesmen call on the accounts assigned to them in their respective territories in rotation, and, because of the additional assistance a small jobber requires, spend an equal or greater amount of time with the small jobber account than with the large jobber account. Petitioner's total salesman expense for 1949 was $159,433.59, and its salesman cost per jobber account serviced by its salesmen was $204.

Petitioner's advertising is not of the institutional sort customarily appearing in national magazines, but is directed primarily to the jobbing trade through the media of trade publications, direct mail and the like.

Petitioner's catalogs are distributed uniformly among its jobber customers, the smaller jobber, without salesmen on his staff, customarily requiring more catalogs as "silent salesmen" than the larger jobber.

In 1949 petitioner spent $100,437.11 on advertising, and its advertising cost per jobber account for that year, including its catalog expense, was $115.97.

Combining petitioner's salesman cost per account of $204 and its advertising and catalog cost per account of $115.97, gives a total cost per account of $320 for these

2. A comparison of petitioner's base jobber price before discount on 57 of its most popular items with the prices charged therefor by its ten principal competitors shows petitioner's prices to be the same on 144 comparisons, lower on 152 and higher on 226.

two items alone, which expense fully justifies petitioner's price differentials at every volume discount level.[3]

Cost studies of petitioner's order processing costs and manufacturing costs further justify petitioner's price differentials.

The hearing examiner found that petitioner's price differentials were in part cost justified by its advertising expense (R. 1007, 1008), but the Federal Trade Commission and the United States Court of Appeals for the Seventh Circuit both concluded that petitioner's evidence did not constitute proof of cost justification.

REASONS FOR GRANTING THE WRIT.

1. The decision below holds that the general lowering of prices in good faith to meet the equally low prices of several competitors does not establish a defense under Section 2(b) of the Clayton Act to a claimed violation of Section 2(a).

The decision of the Court below on this point is in conflict with the holding of the Ninth Circuit in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, certiorari denied March 26, 1956, 350 U. S. 991. In the *Balian* case the Ninth Circuit squarely held that a general lowering of prices in good faith to meet the competition of lower prices of various competitors was a complete defense under Sec-

[3]

Jobber Purchase Level	Net Price Paid for Each $100 of Purchases	Selling and Advertising Cost for Each $100 of Sales	Percent of Cost Justification
$ 600	$98.00	$53.33	317%
1,200	93.10	26.66	216%
2,400	91.14	13.33	116%
3,600	88.20	8.88	100%
6,000	83.79	5.33	149%
8,400	82.91	3.81	126%
12,000	82.00	2.66	—

tion 2(b) to an alleged violation of 2(a). The court there stated (p. 366):

> "The 'blanket price cut,' so called in this area, was unquestionably necessary in the opinion of Arden to eliminate a great many of the chiselling cuts, special advantages and rebates given by its competitors in this very area.
>
> * * * * *
>
> "The [District] court, however, found that Arden had actually acted in good faith to meet the low prices of some of its competitors. This finding is not destroyed because it failed to introduce evidence of the quality of the product of the competitor or the quantity of the sales of the competitor. It was not incumbent upon Arden to establish, under the circumstances of this case, the lawfulness of the prices which it claimed to meet. And, even if Arden had gone beyond the technical limits of meeting an equally low price of a competitor and placed the price lower than any competitor, it would not have been a violation of this statute."

The rigid test of a 2(b) defense followed by the court below can only be met by the seller of a single product, such as gasoline or cement, sold in large quantities in competition with one principal competitor.

It cannot possibly be met by a seller whose line of goods consists of many low priced items sold in small lots in nation-wide competition with many competitors. The seller of the multiple item low priced line can only meet the test followed by the Ninth Circuit in the *Balian* case, viz., the general lowering of prices in good faith to meet the lower prices of many competitors.

The conflict in the decisions of the two circuits should be resolved.

2. In the more than twenty years that the defense of cost justification has been available under Section 2(a)

of the Clayton Act to a respondent charged with a violation of that section, this Court has not determined the nature and extent of the proof required to make out such a defense.

Here petitioner made extensive proof which established beyond a doubt that all of its price differentials were fully cost justified. All of this proof stands unrebutted in the record.

The Hearing Examiner concluded that petitioner's price differentials were in part justified by this proof, but, notwithstanding the fact that this proof stood unrebutted, the Federal Trade Commission and the court below reached the conclusion that it was insufficient to establish any cost justification of petitioner's price differentials since it dealt mainly with average costs.

Admittedly, proof of cost justification is difficult, but merely because proof of a fact is difficult does not mean that it is wholly insusceptible of proof. The best available proof should be sufficient.

This Court should clarify the general principles of acceptable proof available for the establishment of a cost justification defense under Section 2(a), for until it sees fit to do so that defense will, as a practical matter, remain wholly unavailable, which was clearly not the intendment of Congress.

CONCLUSION.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES R. SPROWL,
WHITNEY CAMPBELL,
E. MARVIN BUEHLER,
134 South LaSalle Street,
Chicago, Illinois,
Attorneys for Petitioner.

June 24, 1957.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

January 9, 1957

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2(a) of the amended Clayton Act.[1]

The complaint charges that Niehoff, in its nation-wide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and

1. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that "* * * the discrimi-

nations were not justified under the 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications: [1a]

1a. The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
$12,000 and over	7

2. In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

3. The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

4. In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy, or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of discriminations may be to injure, destroy

known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2 (b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

5. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden or rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B.*, *supra*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

---

6. No. 11494 (C. C. A. 7) decided 12-14-56.

7. No. 11509 (C. C. A. 7) decided 12-14-56.

8. 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests

9. Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

10. 15 U. S. C. A. § 21.

in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity, of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to

11. 15 U. S. C. A. §21.

12. *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F. 2d 481, 484.

whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

FINNEGAN, *Circuit Judge*, Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027-1028) the Commission stated, *inter alia*, "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here * * * The lawfulness-

or unlawfulness of its competitors' prices * * * are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

APPENDIX B.

Final Decree

C. E. Niehoff & Co., petitioner herein, having filed in this Court on July 22, 1955, its petition to review and set aside an order to cease and desist issued on May 17, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of C. E. Niehoff & Co., F.T.C. Docket No. 5768"; and the cause having been heard by the Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, modifying said order to cease and desist and affirming said order as modified; and this Court having thereafter on February 21, 1957, denied respondent's petition for rehearing and petition for rehearing en banc:

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that said order to cease and desist is modified to read as follows:

> It Is Ordered that respondent C. E. Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.
>
> It is Further Ordered that this cease and desist order shall take effect at such time in the future as the

United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order of the respondent Federal Trade Commission, as hereby modified, is affirmed.

By the Court.

(S.) J. EARL MAJOR,
(S.) ELMER J. SCHNACKENBERG,
United States Circuit Judges.

Dated: March 28, 1957.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP -6 1957
JOHN T. FEY, Clerk

No. 225

In the Supreme Court of the United States

OCTOBER TERM, 1957

C. E. NIEHOFF & CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Attorney,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:

American Can Co. v. *Russellville Canning Co.*, 191 F. 2d 38 — 10

Automatic Canteen Co. v. *Federal Trade Commission*, 346 U. S. 61 — 10

Balian Ice Cream Co. v. *Arden Farms Co.*, 231 F. 2d 356, certiorari denied, 350 U. S. 991 — 13

Federal Trade Commission v. *Cement Institute*, 333 U. S. 683 — 11, 12

Federal Trade Commission v. *Morton Salt Co.*, 334 U. S. 37 — 10

Federal Trade Commission v. *National Lead Co.*, 352 U. S. 419 — 11, 12

Federal Trade Commission v. *Nichoff*, 353 U. S. 982 — 4

Federal Trade Commission v. *Staley Mfg. Co.*, 324 U. S. 746 — 6, 11, 12

Federal Trade Commission v. *Standard Oil Co.*, 233 F. 2d 649; certiorari, granted, 352 U. S. 950 — 12

Reid v. *Harper & Brothers*, 235 F. 2d 420, certiorari denied, 352 U. S. 952 — 10

Statutes:

Administrative Procedure Act, Section 7 (c), 5 U. S. C. 1006 — 9

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13:

Section 2 (a) — 2, 3, 9

Section 2 (b) — 3, 6, 11, 12, 13

437554—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 225

C. E. NIEHOFF & CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. i) is reported at 241 F. 2d 37.

JURISDICTION

The final decree of the Court of Appeals (Pet. App. xii) was entered on March 28, 1957. The cross-petition for a writ of certiorari was filed on June 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Under Sections 2 (a) and 2 (b) of the Clayton Act, respectively, a seller may defend against a charge of illegal price discrimination by showing (a) that its

price differentials make "only due allowance" for differences in the cost of manufacture, sale, or distribution resulting from the different quantities in which its commodities are sold, or (b) that its lower price was made "in good faith to meet an equally low price of a competitor." The following questions are presented:

1. Whether the Court of Appeals correctly held that there was substantial evidence to sustain the Commission's findings that petitioner had failed to establish that its price differentials were cost-justified under Section 2 (a).

2. Whether price differentials which are part of a nationwide pricing system formulated to meet competition generally, and not designed to meet any specific competitor's lower prices, can be justified as a "good faith" meeting of "an equally low price of a competitor."

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly re-

ceives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

STATEMENT

After extensive administrative proceedings, the Federal Trade Commission found that petitioner, a manufacturer and seller of automotive products, had discriminated in price among its customers, in violation of Section 2 (a) of the Robinson-Patman Act, and issued a cease-and-desist order. The Court of Appeals for the Seventh Circuit unanimously upheld the Commission's findings of violation as supported by substantial evidence and affirmed the order, but modified it to postpone its effective date. The validity of such modification is before this Court in *Federal*

Trade Commission v. *Nichoff*, No. 170, this Term, certiorari granted, 353 U. S. 982.

The basic facts are undisputed. Petitioner manufactures, sells, and distributes automotive replacement parts to jobbers on a nationwide basis (R. 1014). It sells at list, and gives all customers a 2% discount for cash payment. Petitioner classifies its customers, on the basis of total annual volume of purchases, into four categories, and grants additional discounts to those in the three top categories. These discounts range from 5% to 16%, and each customer's discount is determined at the beginning of the year on the basis of its purchases during the preceding year (R. 983, 1014–1015). Rebates are given to customers whose actual purchases would have entitled them to a higher discount than they received (R. 984, 995, 1018).

The Commission found[1] that the business of jobbers of automotive parts is "highly competitive" (R. 1017); that such jobbers generally, and some of petitioner's customers in particular, operate on a "very thin margin of profit—4 percent of sales or less" (R. 986); that all jobbers must take the 2% cash discount, since failure to do so in many instances would wipe out or materially reduce profits (*ibid.*; R. 1015–1016); that jobbers must stock "many lines of products * * * consisting of many thousands of individual items" (R. 986); that their profit is made up of an "aggregate of very small amounts on each" (*ibid.*); and that a smaller discount or price differential than that granted by petitioner directly and

[1] With one exception (see *infra*, p. 8), the Commission adopted the examiner's findings (R. 1027–1028).

markedly affects profit margin" (R. 990, 1015). The Commission further found that, as to jobbers located in the same trading area, the record was "clear" that petitioner's customers are in competition with each other and also with jobbers who buy from petitioner's competitors (R. 985, 1015). The Commission concluded (R. 1017) that petitioner's differentials "are substantial and materially influence the competitive position of purchasers who resell respondent's [petitioner's] merchandise in this highly competitive field," and that the "record clearly shows" that petitioner's "discounts and rebates to its favored customers carried a direct potentiality of injuring, destroying and preventing competition among its purchasers" (R. 1016; see R. 991).

Petitioner relied primarily on two defenses before the Commission: that its price discriminations were made in good faith to meet the equally low prices of a competitor (R. 992–993); and that the differentials were justified by differences in the cost of manufacturing, selling, and distributing resulting from the different quantities in which it sells (R. 1003). The Commission rejected both contentions.

With respect to the meeting of competition claim, the Commission summarized the pertinent evidence as follows (R. 1018):

> * * *. The evidence received indicates that the prices of many of respondent's rival independent replacement parts manufacturers are somewhat lower than its prices. The average of respondent's prices is higher than those of its competitors in this category yet lower than

> the prices of original parts manufacturers such as Autolite and Delco-Remy, who likewise sell into the replacement field. Respondent's discount program is generally similar to some but is not identical with the schedules adopted by ten of its principal independent competitors. The respondent has one basic price schedule and it is from this that its various discounts and rebates are granted. Its accounts, as previously noted, are classified for discount purposes at the beginning of each year. The initial decision correctly found that respondent's price differentials are a part of a nationwide pricing system formulated to meet competition generally and not designed to meet exactly any competitor's prices.

Such differentials, the Commission concluded, could not be justified under Section 2 (b) as a "good faith" meeting of "an equally low price of a competitor." In this connection, the Commission pointed out (R. 1019) that, under this Court's decision in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, "it is individual competitive situations to which the exemptive provisions of the statute relate and not general systems of competition," and "a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense."

Petitioner sought to show that its discriminations were cost-justified with respect to three categories

of expenses: (1) costs of processing and filling orders of various dollar amounts; (2) direct sales expenses on a per account basis; and (3) advertising expenses. As to the first category, petitioner presented a time study showing the cost of processing orders of various sizes (R. 1003). From this study, it calculated, for orders of different amounts, the total processing cost per dollar in net billing (*ibid.*). Petitioner then totalled the net annual billings of a customer in any particular discount bracket and divided the result by the number of orders to ascertain the customer's average size order over the year. The latter figure was then multiplied by the total processing cost per dollar of net billing applicable to that size order to obtain the actual processing cost of that customer's business (R. 1004). The Commission concluded, however, that this method involved a "basic fallacy," since petitioner's discounts were not granted on a quantity per order basis, but upon an annual volume basis, and individual customer's orders varied in size. As a result, the total annual volume upon which the discount is given has no relationship to the size of the individual shipments which made up that volume (R. 1004–1006, 1020).

The second category—direct sales expenses—involved primarily salesmen's salaries and travel expenses (R. 1008). Petitioner, by dividing the total expense by the number of accounts served, calculated an annual sales cost per account, and argued that the same sales expenditure therefore produced greater revenue from the larger accounts than from the smaller ones (R. 1009). The Commission held

(R. 1009, 1020–1021), however, that petitioner had failed to establish by "reliable and substantial proof" (R. 1010) the assumption upon which this calculation rested—namely, that the salesmen made the same number of calls per year on each customer regardless of size (R. 1009), and that petitioner's "general and conjectural" evidence on this issue was "refuted by specific testimony and evidence showing details of the sales activities engaged in in a typical sales territory" (R. 1020; see R. 1009–1010, 1021).

Similarly, with respect to the third category, petitioner divided its total advertising expenses by the total number of jobber accounts to obtain a per account cost, and then allocated this in the same manner as its sales expenses (R. 1022). With respect to advertising items other than catalogues, the Commission upheld the examiner's ruling (R. 1006–1007) that, since such advertising is general advertising not geared to any particular customer or product, it cannot properly be allocated on a customer basis but must be measured by petitioner's overall sales volume (R. 1022). The Commission reversed the examiner's finding (R. 1007–1008) that cost justification had been established with respect to catalogue expenses, since the "basic premise" of that ruling—that the catalogues were distributed to and used by all of petitioner's customers equally—"is refuted by the record" (R. 1023). It concluded, after reviewing the evidence on this point (R. 1023–1024), that "an allocation of catalogue costs equally among [petitioner's] 886 direct jobbing accounts represents an inaccurate procedure" (R. 1024).

The Court of Appeals, upon a careful review of the facts (Pet. App. i–vi), unanimously concluded (*id.* vii) that there was substantial evidence to support the findings of the Commission that petitioner had failed to show either that its price discriminations were cost-justified or had been made in good faith to meet equally low prices of its competitors.

ARGUMENT

1. Petitioner challenges the Commission's ruling that it failed to establish that its price differentials were cost-justified (Pet. 2, 8–9). Pointing out that this Court has never "determined the nature and extent of the proof required to make out" the defense of cost justification under Section 2 (a), petitioner urges that this Court "should clarify the general principles of acceptable proof available for the establishment" of that defense (Pet. 9).

The determination whether price discriminations "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities" in which commodities are sold necessarily involves primarily factual questions. The standard of proof for establishing this defense is the same as that for establishing any other factual contention—namely, showing by "reliable, probative, and substantial evidence" (Administrative Procedure Act, Section 7 (c), 5 U. S. C. 1006) that the differentials are in fact justified by differences in cost resulting from the different quantities in which the goods are sold.

In the instant case, petitioner's cost defense was based on average costs, and no attempt was made to produce "concrete and specific evidence of cost variances in dealing with different purchasers." *Reid v. Harper & Brothers*, 235 F. 2d 420, 421–422 (C. A. 2), certiorari denied, 352 U. S. 952. The examiner and the Commission carefully reviewed the evidence, but held that it involved a number of basic fallacies and therefore did not accurately reflect actual cost savings. As the examiner concluded (R. 1041), petitioner "has attempted to establish its defense of cost justification in much the same manner as its defense of meeting competition in good faith—generally, instead of specifically, with generalizations and opinion rather than with detailed records which are solely within its knowledge and ability to keep and maintain and under its control." Although it may be difficult to show cost justification (cf. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 68–69), cost studies, to be acceptable, nevertheless must reflect "with substantial accuracy" the differences in selling costs to the customers in the different price brackets. *American Can Co. v. Russellville Canning Co.*, 191 F. 2d 38, 59 (C. A. 8).

"[T]he burden of showing a cost justification is on the seller in a § 2 (a) proceeding." *Automatic Canteen* case, *supra*, p. 76; see *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 44–45. The Commission found, as a factual matter, that petitioner had failed to meet that burden, and the Court of Appeals upheld these findings as supported by substantial evidence. That conclusion, we submit, was correct.

and its validity presents no question warranting further review.

2. The Court of Appeals also correctly held that the Commission properly rejected petitioner's claim that its price discriminations had been made in good faith to meet the equally low prices of competitors. The Commission rejected the defense on the ground that "a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense" (R. 1019). The Commission thus correctly applied the rule that the meeting competition defense "places emphasis on individual competitive situations, rather than upon a general system of competition" (*Federal Trade Commission* v. *Staley Mfg Co.*, 324 U. S. 746, 753) and that Section 2 (b) does not "permit[s] a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725; see also *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 431).

In *Staley*, the sellers involved "never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). Similarly, in the instant case, petitioner's price differentials are "constructed

for all of its competition rather than any particular competitor" (R. 999), and petitioner "maintains its pricing system as is, under the volume discounts established, and never departs therefrom regardless of specific price cutting" (R. 996). We submit, therefore, that the Commission and the court below, in rejecting petitioner's meeting competition defense, correctly applied the holding of this Court in *Staley* and *Cement*—and recently reaffirmed in *National Lead*—that the Section 2 (b) defense cannot be used to justify a general pricing system.[7]

[7] To this extent, the case is similar to *Federal Trade Commission* v. *Standard Oil Company*, No. 24, this Term, certiorari granted, 352 U. S. 950. In that case, to which petitioner makes no reference, the Government is challenging an earlier decision of the court below (233 F. 2d 649) upholding a Section 2 (b) defense where a discount was regularly granted to certain so-called "jobber" customers pursuant to Standard's long-established and inherently discriminatory pricing policy. There, however, Standard argued—and the Commission found—that Standard's pricing policy was also used by some of Standard's major competitors; that Standard and its competitors employed the same criteria for classifying customers as "jobbers"; and that Standard and its competitors granted the discriminatory "tank-car" price to all customers so classified.

In the instant case, petitioner's discriminatory prices did not meet any or all competitive prices in the great majority of instances (R. 999). As the Commission stated (R. 1018): "* * * the prices of many of respondent's rival independent replacement parts manufacturers are somewhat lower than its prices. The average of respondent's prices is higher than those of its competitors in this category yet lower than the prices of original parts manufacturers such as Autolite and Delco-Remy, who likewise sell into the replacement

Petitioner contends (Pet. 7–8) that the decision below conflicts with *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C. A. 9), certiorari denied, 350 U. S. 991. There, according to petitioner (Pet. 7–8) the Ninth Circuit "held that a general lowering of prices in good faith to meet the competition of lower prices of various competitors was a complete defense under Section 2 (b) to an alleged violation of 2 (a)." In *Balian*, however, the court held only that there was substantial evidence to support the finding of the trial court that a "blanket price cut" made in the Los Angeles area by a seller of ice cream had been made "in good faith to meet the low prices of some of its competitors" (p. 366). In the instant case, on the other hand, the Commission found that petitioner never had reduced its prices to meet lower prices of competitors, but on the contrary "maintains its pricing system as is, under the volume discounts established, and never departs therefrom regardless of specific price cutting" (R. 996).

---

field. Respondent's discount program is generally similar to some but is not identical with the schedules adopted by ten of its principal independent competitors."

In these circumstances, wholly apart from the question of "good faith," it could not possibly be said that petitioner's price discriminations were made "to meet an equally low price of a competitor." It follows that, even assuming *arguendo* that the Section 2 (b) defense in *Standard* were upheld by this Court, the Section 2 (b) defense in the instant case was properly rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission.

SEPTEMBER 1957.